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SUPREME COURT OF APPEALS OF VIRGINIA.

RICHMOND.

O'BOYLE V. COMMONWEALTH.*

December 5, 1901.

1. CRIMINAL LAW—*Murder—Indictment as at common law.* On an indictment for murder in the usual common law form, the accused may be found guilty of murder of the first degree, or of the second degree, or of manslaughter. The statute creating two degrees of murder did not necessitate any change in the form of the indictment.
2. CRIMINAL LAW—*Felony—Continuance—Absence of prisoner.* Where the prisoner is not prejudiced, it is not error to continue an indictment against him for a felony in his absence.
3. CRIMINAL LAW—*Venireman—Voir dire—Presumption of prisoner's innocence.* It is not error to refuse to permit a venireman, on his *voir dire*, to be asked if he can go into the jury box presuming the prisoner innocent until his guilt is proved by the evidence, where substantially the same question is asked him by the court in another form.
4. CRIMINAL LAW—*Homicide—Relations of deceased and prisoner—Motive.* In cases of homicide, where the *corpus delicti* has been proved, it is competent to show the relations of the accused and the deceased, and their state of feeling and course of conduct toward each other. Such evidence is received for the purpose of showing the motive and intent with which the act charged was done. The admissibility of such evidence is not determined by the length of time intervening between the threat, or act proved, and the homicide under investigation, but the weight to be attributed to it by the jury will be in proportion to the proximity of time, and the directness of its connection with the principal fact under consideration.
5. CRIMINAL LAW—*Dying declarations—Foundation—Purpose—Weight.* Declarations made under a sense of impending death of the declarant, without any hope or expectation of recovery, are received to identify the party committing the homicide, to establish the circumstances of the *res gestae*, or to show the transactions from which the death of the declarant results, and are entitled to the same weight as if made under oath.
6. CRIMINAL LAW—*Dying declarations—Signed and unsigned—Estoppel.* Where a signed dying declaration has been excluded on the motion of the prisoner, he will not be heard to object to the introduction of evidence of a verbal declaration for which a proper foundation has been laid.
7. EVIDENCE—*Pain—Narration of cause—Case at bar.* Whenever material to the issue, the natural expression of present physical pain is competent evidence as a part of the *res gestae*, but everything in the nature of a narration of past occurrences must be excluded. Declarations made by the deceased about 11 o'clock in the morning, while suffering physical pain, to the effect that she

* Reported by M. P. Burks, State Reporter.

had hurt herself by falling against a bed post that morning are not admissible as parts of the *res gestae* on the trial of her paramour for an assault upon her in the evening of that day resulting in her death.

Error to a judgment of the Corporation Court of the city of Newport News, rendered October 31, 1900, whereby the plaintiff in error was sentenced to be hanged for murder of the first degree. *Affirmed.*

The opinion states the case.

C. H. Ruth and *C. C. Mitchell* for the plaintiff in error.

Attorney-General A. J. Montague for the Commonwealth.

KEITH, P., delivered the opinion of the court.

Plaintiff in error was convicted of murder in the first degree in the Corporation Court for the city of Newport News, and the case is before us upon certain exceptions taken to the rulings of the court during the progress of the trial.

The first contention of plaintiff in error is, that the indictment was insufficient to warrant the verdict of murder in the first degree. It is in the usual common law form of an indictment for murder. The question sought to be raised was fully considered in *Livingston's Case*, 14 Gratt. at page 596. Numerous authorities from this and other courts are there discussed, and it was the unanimous judgment of the court that under such an indictment the prisoner may be found guilty of murder in the first or second degree, or manslaughter. *Cluverius v. Commonwealth*, 81 Va. 787; *Kibler v. Commonwealth*, 94 Va. 804.

It is assigned as error in the petition that the case was continued at the July term, 1899, and again at the September term, 1899, in the absence of the petitioner. The trial at which he was convicted took place on the 30th day of October, 1899, and the prisoner was not, in our judgment, prejudiced by continuances of the case prior to that date.

The fourth error assigned in the petition covers a number of points reserved in the record by bills of exceptions. When the jury were being selected, the prisoner by counsel propounded to S. S. Lear the following interrogatory: "Can you go into the jury box presuming the prisoner innocent until he is proven guilty by the evidence?" The attorney for the commonwealth objected to this question, the court sustained the objection, and in lieu thereof instructed the venireman

that the law presumes every man charged with the commission of a crime innocent until proven guilty, and asked "said venireman whether he could serve upon the jury in this case, giving the prisoner the full benefit of this presumption, to which the venireman answered that he could." We think the question excluded and the one propounded are substantially identical, and that the change in form could not have been prejudicial to the prisoner.

The Commonwealth introduced Carry Clayton as a witness on its behalf, and asked her the following question: "Did you know Alma Hamilton, and were you at her house on the 2d day of June, and if so, what took place at Alma's house on that day?" To which interrogatory the witness answered: "I knew Alma Hamilton; she was a colored woman. I was at Alma Hamilton's house on the second day of June, 1899. Alma was drinking that afternoon, and Mrs. Godsey said"— Here the prisoner, by counsel, objected to witness making any statement of what Mrs. Godsey said as being hearsay, and therefore not admissible, unless a part of the *res gestae* or connected in point of time with the offense charged in the indictment; whereupon the court overruled the objection and allowed the witness to continue and the answer to go to the jury. The witness continuing, said: "Lucy Hubbard and Mrs. Godsey said they would tell Billie (meaning William O'Boyle) Alma was drinking, when the doctor had ordered her not to drink on account of the baby. And Alma said, 'Tell him,' and stuck her head out of the window and yelled to some colored man, 'Tell Billie I am drinking and drinking like hell,'" which answer as well as the question was objected to by the prisoner through his counsel, who moved that the answer be stricken out and not be allowed to go to the jury, as it failed to show that the prisoner was present, or that the conversation was ever communicated to him, or to show any motive for the commission of the crime charged in the indictment, which objection was overruled.

It appears from the testimony of the prisoner, who was a witness in his own behalf, that this conversation was communicated to him, in substance, at least.

Another objection was to a question asked the same witness: "What relationship existed between William O'Boyle and the deceased, Alma Hamilton? The court overruled the objection, and stated to the jury that the evidence was not admitted to show immoral character, but to show relationship and as explanatory of the parties' conduct toward each other, and to show motive. The answer given by the witness was:"

“They lived together as man and woman ; they lived just as a man and wife would do.”

We are of opinion that the evidence was properly admitted.

The same witness was asked: “Who claimed to be the father of Alma Hamilton’s baby?” The prisoner objected to this question as calculated to prejudice the minds of the jury and tending to prove the immoral character of the prisoner. The court overruled the objection for the reason assigned by it with respect to the objection of which we have just disposed, and there was no error in the ruling.

The same witness was asked: “Did they ever have any difficulty before (meaning the deceased and the prisoner at the bar), and what were the nature of those difficulties, if they had any?” To which question the prisoner objected as tending to prove a separate and distinct offense unless shown by the commonwealth to be connected in point of time with the offense charged in the indictment; but the court overruled the objection and instructs the jury “that evidence of antecedent difficulties was not admitted to show that because they had had difficulties before they had the one which is the subject of this investigation, but to show motive and the relation of the parties to each other.”

The witness answered: “Yes, sir; I saw them have a difficulty a good while before this. He kicked her and beat her once when she lived at my sister’s house last year.” To which question and answer the prisoner, by counsel, objected, which objection the court overruled.

In *Commonwealth v. Goodwin*, 14 Gray 55, evidence of threats of revenge uttered by the defendant from one to two years before the fire, against the owner of the building, was admitted, the court saying: “The weight of the evidence might be diminished in proportion to the length of time which intervened, but its competency would not be affected.”

In *State v. Hoyt*, 46 Conn. 330, upon a trial for murder the attorney for the State offered evidence that the prisoner had, thirteen years before the homicide, declared that he would like to put a ball through the head of the man murdered, with evidence of declarations of a like character, made one, three and four years before the homicide. Held that the remoteness of time of the declaration went solely to its weight as evidence, and not to its admissibility.

Tarver v. State, 43 Ala. at page 355: “It was competent for the State to prove the fact of the previous difficulty, although not neces-

sary, for the purposes stated in this case; that is, to prove malice on the part of the accused, as an old grudge and threats were admitted by him. But the State should not have been permitted to prove the circumstances of the former difficulty."

In *People v. Jones*, 99 N. Y., decided June, 1885, it appears that in August, 1883, a witness was in a near room to that occupied by the defendant and his wife; that "she heard the prisoner say 'damn you,' and then heard the report of a pistol, and that his wife came rushing into her room badly frightened and agitated. In the spring of 1884, while in a room near to that occupied by the defendant and his wife, the same witness heard again the report of a pistol in that room, and upon entering the room found the wife in bed in a fainting condition."

The court held: "There was evidence sufficient to enable the jury to find that the shots were fired by the defendant, either at his wife, or in anger to frighten her. In cases of homicide it has always been held competent to show the conduct and feeling of the prisoner toward his victim, and proof that he had made previous threats or attempts to kill his victim has always been received. Evidence of such facts is received not because the facts give rise to a presumption of law as to guilt, but because from them, in connection with other circumstances, and proof of the *corpus delicti*, guilt may be inferred. This evidence did not of itself establish the fact that the defendant intended to kill his wife at the time he fired the fatal shot; but it was to be weighed by the jury in connection with all the facts surrounding the homicide for the purpose of determining the motive and intent of the defendant at the time."

In *Commonwealth v. Holmes*, 157 Mass. 233. At the trial of an indictment for the murder of the defendant's wife, whose body was found buried in the cellar of the house occupied by them, evidence in detail of threats and acts of violence by the defendant towards his wife, extending over a period of nearly nine years, from shortly after their marriage to about the time of the homicide with the exception of fifteen months, when they were living separately, is admissible for the purpose of showing a course of conduct on the part of the defendant; and the question of the remoteness of the threats and acts is addressed to the discretion of the court.

In *State v. Rash*, 12 Iredell's Reps. 382, "evidence of long course of ill treatment of his wife, for the purpose of proving malice, is admissible against a husband on trial for her murder," the court say-

ing: "We are of opinion, then, that his honor did not err in receiving the testimony objected to, because malice may be proved as well by previous acts as by previous threats, and often much more satisfactorily."

In 3 Russel on Crimes, 9th ed. 288, it is said: "On the trial of an indictment for murder, former grudges and antecedent menaces are admitted to be given in evidence as proof of the prisoner's malice against the deceased." And in a note to that sentence, it is said: "In many cases evidence of previous violence has been given in cases of murder without objection, and such evidence clearly tends to prove ill will."

In 2 Bishop on Criminal Procedure, sec. 630, "on a charge against the husband for murdering his wife, it may be shown that they quarrelled, or that he ill-treated her. . . . A prior difficulty, yet not irrelevant particulars, between any defendant and the deceased, may be shown."

This whole subject was most exhaustively investigated in the recent case of *Molineux* (upon an indictment for murder) v. *People*, 61 N. E. Rep. No. 14, Nov. 15, 1901, p. 286, where it is said: "On a criminal trial the State cannot prove any crime against the defendant which was not alleged in the indictment, as a foundation for a separate punishment, and as aiding the proof that he was guilty of the crime charged, unless such other crime tends to prove motive, intent, the absence of mistake or accident, the identity of the person charged with the commission of the crime, or a common scheme embracing the commission of two or more crimes so closely related that proof of one tends to establish the other." *Taylor v. Commonwealth*, 90 Va. 109; *Kibler v. Commonwealth*, 94 Va. 804.

The evidence objected to was not admitted as tending to prove the perpetration of the crime with which the prisoner was charged, but for the purpose of showing the relations between the parties, their state of feeling and course of conduct towards each other and as reflecting light upon the motive and intent with which the act was done. Nor is the admissibility of such testimony to be determined by the length of time which intervened between the threat or act proved, evidence of which is introduced, and the homicide under investigation, but the effect to be attributed to it by the jury will be in proportion to its closeness in point of time and the directness of its association with the principal fact under consideration.

The authorities cited fully sustain the trial court, and this assignment of error must be overruled.

The next objection is to the admission of the dying declaration.

B. R. Gary, a witness for the commonwealth, testified that he was a physician and the coroner of Newport News; that on the 3d of June, 1899, he went to the home of Alma Hamilton to see her in order to get a statement from her in case she died. He told her that she was bound to die, and she said she knew it. Witness found Judge Brown of the police court at her bedside who took her statement and wrote it down. The witness was then asked by the attorney for the commonwealth: "What did Judge Brown say to her?" Which question was objected to by the prisoner as being hearsay and not in the presence of the accused, but this objection was overruled by the court, and prisoner excepted. The witness proceeding to answer said interrogatory, said: "Judge Brown asked her if she realized her condition and she (Alma) said she did. He then told her that she should not go into eternity with a lie on her lips. She said she appreciated it."

The commonwealth's attorney then asked of the witness: "What was her statement to Judge Brown?" This question was objected to by the prisoner on the ground that sufficient foundation had not been laid for the introduction of a dying declaration. Whereupon the commonwealth's attorney offered to lay sufficient foundation for the introduction of the same, and withdrew the witness from the stand, and called J. D. G. Brown, who was sworn and testified as follows: "I am Judge of the Police Court of the city of Newport News. On June 3, 1899, I was called and heard that a woman was dying over in the Rocketts from injuries received and I went over there at the request of the commonwealth's attorney to get her dying declaration. I went to No. 456 24th street, and found Alma Hamilton in bed. Coroner Gary was there and one or two colored women. I asked her if she realized her condition, and she said she did. I told her she ought not to go into eternity with a lie on her lips, and she said she appreciated it; she did not make any exclamations indicating pain or the like, except that she said 'Oh God' once; did not appear to use it in supplication or prayer; but just as a boy would say, 'Oh lordy' who has stumped his toe; that was all she said except her dying declaration."

"Thereupon the commonwealth's attorney asked the witness to state all she said in her dying declaration. The prisoner objected to the witness giving parol evidence as to the contents of the dying declaration on the ground that no sufficient foundation had been laid for the introduction of a dying declaration; that it was in evidence that the declaration, if admissible, was in writing, and therefore parol evidence

of the contents was not admissible unless the absence of the written declaration was accounted for; and thereupon the commonwealth's attorney introduced a written instrument purporting to be the dying declaration of Alma Hamilton, which the witness stated was the declaration written by him and signed by Alma Hamilton, and that it was, so far as he knew, the only statement made by her as a dying declaration."

"The admission of the written dying declaration as produced was objected to by the prisoner through his counsel as not a good dying declaration, and that no sufficient foundation had been laid by the commonwealth for the introduction of the same; but before the court could pass upon the sufficiency of the same, it was withdrawn by the attorney for the commonwealth, who refused to again put the same before the court; whereupon the prisoner insisted that the court pass upon the sufficiency, which the court refused to do, and to which judgment of the court the prisoner excepted."

"The witness was then asked to tell what Alma Hamilton said in her dying declaration, which question the prisoner objected to as the written declaration was in existence and the best and the only admissible evidence until the court should pass upon its sufficiency and determine if it was admissible in evidence as a dying declaration, which objection the court overruled, and the prisoner excepted to the opinion of the court in overruling it."

Witness in answer said: "The declaration was that Alma Hamilton said that William O'Boyle came to the house and that she was at Lucy Hubbard's; he smacked her once, and that they had an altercation, and that she tore his shirt off, and that he knocked her down and stamped her twice; and she then crawled into her room, and that he came back and kicked her in the back."

The prisoner again objected to the answer, which objection the court overruled, and the prisoner excepted.

The commonwealth had made out a sufficient case for the introduction of a dying declaration. Such declarations are admissible when made under a sense of impending death without any hope or expectation of recovery. "When this is made to appear by proof, or by the circumstances of the case, dying declarations to identify the prisoner, or to establish the circumstances of the *res gestae*, or to show transactions from which death results, are always admissible, to have the same weight as if made under the sanction of an oath. For it is considered that when an individual is in expectation of impending death, all

temptation to falsehood, either of interest, hope or fear, will be removed, and the awful nature of his situation will be presumed to impress him as strongly with the necessity of a strict adherence to truth as the most solemn obligation of an oath administered in a court of justice." *Swisher v. Commonwealth*, 26 Gratt. 964.

It fully appears here that the declarant was well apprised of the mortal nature of the injury she had received and was conscious of impending death. The commonwealth having laid the foundation offered in evidence for the written declaration, upon the prisoner's objection, that declaration was withdrawn. He cannot be heard to complain because the commonwealth, at his request, did what he asked the court to compel it to do. The written declaration having been withdrawn, it was plainly proper to introduce evidence of a verbal declaration.

Isaac Berman, a witness introduced for the defense, testified as follows: "I kept a grocery store at No. 456 Twenty-fourth street, in the city of Newport News, on June 2d, 1899. I knew Alma Hamilton. I knew Billie O'Boyle. He used to come there and get orders for meals and things. He worked in a restaurant at Twenty-third street and Warwick avenue. Alma used to deal with me. She came into the store at 11 o'clock A. M. on June 2d. I asked her when she was going to take laudanum again. She said she had had enough, and showed me her neck and chest where it was bruised, and said that was what it had done for her last time she took it. She bought snuff while she was there. I saw her rushing the 'growler' for beer all day—she had it in a white pitcher with flowers on it."

"What else did she say at 11 A. M. on June the 2d?"

"She told me about an accident she had that morning."

When the witness had reached this point without objection, counsel for prisoner asked him what was the nature of the accident which happened to her on the morning of the 2d of June? To this question the commonwealth, by its attorney, objected, and the objection was sustained by the court.

The attorney for the prisoner sought to elicit what he desired to know by propounding substantially the same questions, with various modifications, which were objected to and excluded; and thereupon the court's attention was called by the attorney for the defense to the testimony of Dr. Hume in this case, who said:

"I was present at the autopsy over the body of Alma Hamilton, and found an injured peritoneum, evidently caused by striking an

object, or being struck by an object; that it could have been caused by stamping with the foot ; that this injury caused peritonitis and that peritonitis caused Alma Hamilton's death; that the wound he found in the abdomen could have been caused as readily by propelling the body against an object as by propelling an object against the body, and that falling against a desk, chair or bed could have caused this injury."

The accused then offered to prove by the witness, Isaac Berman, "that Alma Hamilton stated on the morning of June 2, 1899, that about 9 or 10:30 A. M. of the same day, and some hours prior to the difficulty between her and William O'Boyle, she was trying to lay the baby on the bed; that she fell and the bed post struck her in the stomach; that she was at the time of this conversation suffering and complaining terribly of pains in the stomach from this injury, and offers to prove by medical experts that a person receiving such an injury in Alma Hamilton's condition would be liable to peritonitis, and that the natural and probable result of such an injury would be peritonitis and death."

To this evidence the commonwealth again objected, and it was excluded.

In Stephen's Digest of the Law of Evidence (2d ed.), page 47, it is said: "It is a general rule that expressions of present bodily pain or suffering or symptoms of illness are admissible as part of the *res gestae*, and whether made to physicians or to other persons, may be proved by those who heard them. But statements as to past sufferings, or as to the past cause of the injury or of the suffering, are not admissible. . . . Some cases even assert (mainly, however, as *dicta*) that statements made to a physician for medical treatment may be proved, though they relate to past (as well as present) feelings and symptoms."

In Greenleaf's Evidence (15th ed.), section 102, it is said: "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof of its existence. And whether they were real or feigned is for the jury to determine."

And in a note upon that section it is said: "The rule admits, however, only exclamations of present pain or statements of present symptoms. All statements made by the sick person relating to past

transactions, however closely they may be connected with the present sickness, and even (it is held in most States) though stating the cause of the sickness or injury, should be rejected even if made to a physician for treatment, unless the statements are otherwise admissible, as part of the *res gestae*." See also Wharton's Crim. Ev., 9th ed., sec. 264.

In *Smith v. State*, 53 Ala. 487, it is said: "Declarations made by the deceased, about ten o'clock on the morning of the day before her death, while suffering with paroxysms of pain and vomiting—in answer to question asked in the hearing of the husband—to the effect that she was taken sick while at breakfast that morning, at which she had eaten bread, are not admissible as parts of the *res gestae* on the trial of the husband for poisoning her. Such evidence might be received as the basis of a medical opinion, but as evidence of independent facts it is entirely inadmissible."

In *Williams v. Great Northern Ry. Co.*, Supreme Court of Minnesota, 37 L. R. A. p. 199, it is held: "Whenever bodily suffering is material to be proved, expressions or complaints, made at the time, which are the natural and instinctive manifestations of pain and suffering, are competent evidence as part of the *res gestae*, and may be testified to and described by any person in whose presence they were uttered. Distinction is noted between such complaints and the mere narration of past symptoms or simple descriptive statements, which furnish no evidence of the existence of suffering except the assertion of the party."

In *Commonwealth v. Jardine*, 143 Mass. 567, the defendant offered testimony to show that he was severely beaten by the person alleged to have been assaulted, and attempted to show that during his confinement he made complaints of pain and suffering in limbs and body. The court held "it was competent for the purpose for which it was offered, and should have been admitted. The complaint of pain and suffering would not include statements of facts, nor narrations of past occurrences."

Insurance Co. v. Mosley, 8 Wall. 397, was an action on a policy of insurance and the proof was that the assured left his bed Wednesday night, the 18th of July, 1866, between 12 and 1 o'clock; that when he came back, he said he had fallen down the back stairs, and almost killed himself; that he had hit the back part of his head in falling down stairs. Witness stated that his voice trembled; that he complained of his head, and appeared to be faint and in great pain.

Objection was taken to that part of this evidence which related to

his falling down stairs and the injuries he received by the fall; and the court, Mr. Justice Swayne delivering the opinion in which it was held that the evidence should have been admitted, said:

"There is a limitation of this doctrine that must be carefully observed in its application.

"Such evidence must not be extended beyond the necessity upon which the rule is founded. It must relate to the present, and not to the past. Anything in the nature of narration must be excluded. It must be confined strictly to such complaints, expressions, and exclamations, as furnish evidence of 'a present existing pain or malady.' Examined by the standard of these rules, the testimony to which this exception relates was properly admitted."

The observations of the court in that case thus far quoted are in entire accord with the cases and text writers which we have already cited. But, continuing, the court said: "Was it competent to prove the fall by the declarations of the assured made under the circumstances disclosed in the bill of exceptions." And it was held that the evidence was admissible for that purpose as being so near in point of time to the fact as to constitute a part of the *res gestae*.

Of this case Grover, J., in *People v. Davis*, 56 N. Y. 102, said: "The doctrine as to what may be regarded as part of the *res gestae* was certainly carried to its utmost limit by a majority of the court;" but with this feature of the opinion we are not now concerned.

The declaration sought to be introduced in the case before us was certainly not a part of the *res gestae*, and nowhere is the distinction between the value of exclamations as evidence of a present existing pain or malady and such expressions when in the nature of a narration of a past transaction, more clearly presented than in *Insurance Company v. Mosley*.

In *Fleming v. Springfield*, 154 Mass. 520, the court dealing with this question, said: "The testimony of Dr. Rice was properly admitted. The statement made by the plaintiff purported to be a description of his symptoms at the time it was made, and not a narrative of something that was past."

Northern Pac. R. R. Co. v. Urlin, 158 U. S. 271, is in harmony with the authorities we have considered. See also *Livingston's case*, *supra*, to the same effect.

The statements of Alma which were rejected were not admissible as a part of the principal transaction under investigation. They did not bear directly or indirectly upon the assault made upon her by plaintiff

in error; nor, if the accident alleged to have happened to Alma be considered the *res* or subject under consideration, were they so related to that incident in point of time or circumstance as to constitute a part of it. It was an effort to introduce a narrative of a past occurrence resting upon the mere statement of the deceased, and was plainly hearsay evidence and not within any exception to the rule which forbids its introduction.

We are of opinion there is no error in the judgment complained of, and it must be affirmed.

Affirmed.

NOTE.—We concur so fully in the reasoning of the court and the conclusions reached that it would seem that any annotation of the principal case was unnecessary. Some doubt, however, has been expressed as to the correctness of the conclusion of the court in refusing to receive the declarations made by the deceased on the morning preceding the fatal assault. It is argued that, in view of the evidence of Dr. Hume that the internal wound of which the deceased died “could have been caused as readily by propelling the body against an object as by propelling an object against the body,” the declarations of the deceased should have been received. These declarations, made on the morning of the homicide, and some hours prior thereto, were to the effect that the deceased “fell and the bedpost struck her in the stomach, and that she was at the time of the conversation suffering and complaining terribly of pains in the stomach from this injury.”

The effort of the accused was to show that the injury resulting in the death of the deceased might have been caused by the accident as well as by the injuries inflicted by the prisoner. This was a pertinent fact, therefore, to be proved, but whether the fact to be established was the fact in issue, or merely a fact relevant to the fact in issue, in either event, it should have been established by competent evidence. It might have been entirely proper to show the accident in the morning, and the probable consequences of such an accident, but this was a fact to be established as any other fact in the case by competent evidence, and not by hearsay, and if this fact could have been so shown, undoubtedly the court would have permitted it to have been done. The point made and insisted upon in the opinion is that the fact could not be shown by *heresay*. The declaration of the deceased, as stated in the opinion, as to bodily or mental feelings was entirely proper, but it was not proper to give her narration of past occurrences. In the 16th edition of Greenleaf on Evidence, section 162 b, it is said: “Statements as to the *circumstances of an injury* (as that a person was knocked down by a horse) or the *nature of the injury* (as that a leg was broken) are not within the exception which covers only statements of an internal condition.” This is exactly the conclusion reached by the court, and it seems sound on principle and authority.

Just what constitutes the *res gestae* is not an easy matter to determine from cases even in a single jurisdiction. The Virginia cases on the subject are collected in “Virginia Reports Annotated,” covering 25 Gratt. 943. As these Reports are probably accessible to the majority of the readers of the REGISTER it is not deemed necessary to do more than refer to them.

M. P. B.